



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-88-4

FACTS:

You are counsel to a non-profit organization that sells certain products to municipalities. Most of the directors and most of the trustees of your organization are municipal officials of the municipalities which are members of your organization. The directors and trustees of the organization are unpaid for this work.

QUESTION:

Does G.L. c. 268A, s.19 permit municipal officials who are directors or trustees of this organization to participate in their municipality's decision to contract with this organization?

ANSWER:

No, unless they are appointed officials who receive an exemption under s.19.

DISCUSSION:

Municipal officials are municipal employees as defined in the conflict of interest law and, as a result, are subject to the provisions of that law. G.L. c. 268A, s.1(g). Section 19 of c. 268A[1] prohibits municipal employees from participating[2] as such in any particular matter[3] in which a business organization in which they are serving as an officer or director has a financial interest.[4]

Non-profit corporations, like this organization, are business organizations for the purposes of s.19, and the decision to contract with this organization is a particular matter in which the organization has a financial interest. Accordingly, a municipal employee who is a director or officer of the organization may not participate in their municipality's decision to contract with the organization.

We base this conclusion on longstanding Commission precedent that non-profit corporations that conduct business are business organizations for the purposes of the conflict of interest law. See, e.g., EC-COI-82-25; 81-56. Although early opinions of the Attorney General construing s.6 of the statute (the parallel provision involving state officials) indicated that s.6 did not apply to nonprofit organizations, a long line of Attorney General and Commission precedent extending forward from Conflict Opinion No. 613 (February, 1974) concludes that a nonprofit organization is a business

organization. In particular, organizations engaged in the buying and selling of commodities or services have been found to be business organizations.[1] The General Court, in St. 210, s.24 indicated that Conflict Opinion No. 613 and its progeny shall remain valid and shall be binding on the Commission until and unless reversed or modified by the Commission. We decline to reverse or modify this precedent.

This long-standing precedent reflects Attorney General Quinn's and, subsequently, the Commission's conclusion that s.19's purpose is, as one commentator has noted, to target certain kinds of financial interests which may be presumed to "undermine the employee's ability to perform his public function disinterestedly and which are likely to undermine the confidence of the public in the employee's governmental service." Buss, supra, at 301. Such a conclusion is reflected in a reading of s.19 that acknowledges that the pressure to perform public service in favor of a business organization, of which the municipal employee is a trustee or a member of the board of directors, is not lessened by the internal structural characteristics of that business organization. There is no distinguishing characteristic peculiar to nonprofit business corporations or even to nonprofit business corporations whose membership is limited to public entities, or a majority of whose board of directors or trustees are municipal officials, that convinces us that the prohibitions of s.19 should not apply. To rule otherwise would produce anomalous results. Buss, supra, at 357. If the purpose of an organization is to conduct business, it is within the terms of the statute. The fact that this business organization's constituency is a group of municipalities is irrelevant to this analysis, particularly where the organization is competing with other entities for municipal contracts. You have conceded the financial interest of the organization in obtaining contracts with municipalities. There is nothing about the non-profit structure of the organization that lessens the risk that a municipal employee serving as a trustee or a member of the board of directors of the organization would not be disinterested in the continued existence of the organization or influenced, as municipal employees, to put the business organization's interests before that of the municipality.

There is no s.19 violation inherent when a municipal official serves the organization as a trustee or a member of the board of directors. The conflict law targets only those of the above described officials who wish to participate as municipal employees in their municipality's decision to contract with the very business organization they serve.

You should also note that s.19(b) contains an exemption for those of the above described municipal officials who are appointed. Those individuals, by advising their appointing authorities of the nature and circumstances of the particular matter at issue and their financial interest in it, may receive a written determination from that authority that the interest involved is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. The exemption does not apply to elected officials.

DATE AUTHORIZED: February 3, 1988

[1] (a) Except as permitted paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both. (b) It shall not be a violation of this section (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee, or (2) if, in the case of an elected municipal official making demand bank deposits of municipal funds, said official first files, with the clerk of the city or town, a statement making full disclosure of such financial interest, or (9) if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

[2] "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[3] "Particular matter," any Judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[4] You have already agreed that municipal officials who are trustees or members of the Board of Directors of one or more of the Associations may not act as agents or spokespersons for the Associations before any municipal agencies. see, c.g., EC-COI-84- 76. We note that the policy reflected in s.17(c) is that of protecting the public interest in situations where there is potential for divided loyalties, influence peddling,. the use of insider information, or favoritism. See generally, Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U. Law Rev. 299(1965); Town of Edgartown v. State Ethics Commission, 391 Mass. 83 (1984).